

CERTIFIED FOR PARTIAL PUBLICATION*

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

SILVANO ANGEL LOPEZ,

Defendant and Appellant.

E048655

(Super.Ct.No. SWF026199)

OPINION

APPEAL from the Superior Court of Riverside County. John I. Kelly, Judge.
(Retired judge of the Kern Super. Ct., sitting under assignment by the Chief Justice
pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and
Theodore M. Cropley, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion
is certified for publication with the exception of parts IIIA and IIIC.

I

INTRODUCTION

Defendant Silvano Angel Lopez attacked the victim—his daughter’s mother—threatening her with a potato peeler and scissors. A jury convicted defendant of three crimes: kidnapping (Pen. Code, § 207, subd. (a)); inflicting a corporal injury while personally using a deadly and dangerous weapon (Pen. Code, §§ 273.5, subd. (e)(1), 1192.7, subd. (c)(23), and 12022, subd. (b)(1)); and making criminal threats while personally using a deadly and dangerous weapon (Pen. Code, §§ 422, 1192.7, subd. (c)(23), and 12022, subd. (b)(1)). The court sentenced defendant to five years in prison and imposed various assessment and fines.

On appeal, defendant asserts three challenges.¹ He contends the court erred by refusing to allow two witnesses to testify about the victim’s purported reputation for lying and making false accusations. He also protests the criminal conviction assessment (Gov. Code, § 70373) and the order prohibiting him from owning, possessing, or controlling any deadly weapon or related paraphernalia. Subject to correction of the abstract of judgment and the sentencing minute order, we affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

The victim testified that she became involved with defendant when she was 14 years old. They have a daughter. At the time of trial in 2009, the victim was 24 years old

¹ Defendant has withdrawn his contentions about lesser-included offenses and concurrent terms.

and the daughter was seven years old.

In July 2008, the victim had married another man but was pregnant by defendant. Five days before the subject events, the victim had an abortion without telling defendant.

On July 10, 2008, the victim dropped off their daughter at defendant's residence for visitation. When she called the house to confirm her daughter had arrived, defendant claimed the child was not there.

The victim panicked and returned immediately, screaming the daughter's name. Defendant appeared on the front porch and came toward the victim's car. He grabbed her by the hair, demanded oral sex, and ordered her out of the car. He called himself a demon and a monster who did not care about their child.

Defendant forced the victim into the house by her hair and her arm. In the kitchen, he pushed a potato peeler against her chest, claiming he was going to kill her with it. The victim denied that she threatened to kill herself using the potato peeler.

She escaped and he grabbed her again and pushed her hard, causing her to fall against a computer desk. He knelt on her with his knee in her crotch, applying pressure to her chest. He said he was going to kill her slowly. He pinched and slapped her and threatened to break her arm. She managed to crawl away and ran to the front door.

Outside he pushed her down again and knelt on her, screaming she was going to die. He grabbed a pair of scissors and held them against her chest, again threatening her with death.

When the daughter approached them and asked defendant to leave her mother alone, he dropped the scissors and ran away. An ambulance took her and the daughter to

the hospital. The victim had sustained various injuries—soft tissue swelling, bruising, hair loss, and scratches.

The daughter testified she was present when defendant grabbed her mother and threatened her and said he was a demon and a monster. She saw him throw down the scissors.

When Deputy Sheriff Carrasco arrived on the scene, the victim was trying to get up with her daughter's help. The victim was breathless and could not speak. Her face was flushed and she was perspiring. She was bleeding slightly and some hair was torn away.

Deputy Carrasco interviewed the victim at the hospital. She said she had dropped off her daughter and when she returned to check on her, defendant confronted her and demanded oral copulation. He mentioned being a monster or a demon and he dragged her out of the car into the house, struggling with her in the kitchen and threatening to kill her slowly with a potato peeler. In the living room, he shoved her against a computer desk and she fell. Defendant prevented her from dialing 911. He jumped on her, held her down, slapped her, hit her, and pinched her breasts. He squeezed and twisted her arm. Outside the house, he armed himself with scissors and again threatened to kill her. He dropped the scissors when his daughter approached them. In contrast, defendant denied that anything had happened. He told Deputy Carrasco that he had only restrained the victim from hurting herself.

The victim also testified about past episodes of domestic violence in 2004 when defendant punched her in the head, kicked her, and threatened her with a knife. Other

incidents caused her to call the police. Defendant pleaded guilty to abuse and harassment committed against the victim in January 2004 and August 2005.

Two female relatives of defendant—his sister and his stepniece—testified that the victim had behaved confrontationally toward defendant and pretended to be injured when the police responded. They claimed the victim frequently misrepresented what happened with defendant and with other people, including the victim’s stepmother.

The victim was estranged from her father and her stepmother after her father pleaded guilty to identity theft for using her identity.

III

ANALYSIS

A. The Victim’s Credibility

The defense theory was that the victim had a history of lying and making false accusations and police reports. In addition to the two other defense witnesses, the defense sought to present the testimony of the victim’s stepmother and stepsister, to the effect that the victim had falsely accused the stepmother of child abuse and coerced the stepsister to join her in false allegations. The court denied the request.

Defendant argues that excluding the two witnesses denied defendant his due process right to present a defense and to receive a fair trial: “‘Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.’” (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1755, citing *Washington v. Texas* (1966) 388 U.S. 14, 19.) Defendant

contends the testimony of the stepmother and stepsister was important to demonstrate the victim was not credible and her testimony “was riddled with inconsistencies and lies.”

The trial court may properly exercise its discretion to exclude collateral evidence like that proposed by defendant. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611; *People v. Laverne* (1971) 4 Cal.3d 735, 742.) Specifically, the exclusion of evidence cannot be challenged unless it would have produced a significantly different impression of a witness’s credibility. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1051.)

We disagree there were any truly significant discrepancies in the victim’s testimony. The exact date of her abortion and her reason for bringing the daughter to defendant’s house were not material facts in establishing defendant’s guilt. The inconsistent details about whether the victim’s shirt was torn during defendant’s attack, the precise nature of her injuries, and the information about photographing her injuries also were not particularly material. Defendant’s complaints about inaccuracies in the victim’s testimony concerning the 2004 and 2005 incidents seem unjustified in view of the fact that these crimes occurred more than four or five years before the present trial and defendant had pleaded guilty to them.

Furthermore, during cross-examination of the prosecution’s witnesses and through the testimony of the two defense witnesses, defense counsel was able to explore thoroughly the issue of the victim’s purported lack of credibility without the necessity of calling on two more witnesses. For the foregoing reasons, we conclude it was not error for the court to refuse to permit two additional witnesses to testify about the victim’s credibility.

Additionally, in view of the testimony by the victim, her daughter, and Deputy Carrasco, we deem any error committed by the court to be harmless. It is not reasonably probable the jury would have reached a different verdict: “Although completely excluding evidence of an accused’s defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused’s due process right to present a defense. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 58.) If the trial court misstepped, ‘[t]he trial court’s ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.’ (*In re Wells* (1950) 35 Cal.2d 889, 894.)” (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103, also citing *People v. Watson* (1956) 46 Cal.2d 818, 836 and *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Cunningham* (2001) 25 Cal.4th 926, 999.)

B. Government Code Section 70373

Government Code section 70373 (section 70373) provides: “(a)(1) To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense, . . . The assessment shall be imposed in the amount of thirty dollars (\$30) for each misdemeanor or felony” The effective date of the statute is January 1, 2009.

Defendant committed the subject crimes in July 2008. The jury convicted defendant in April 2009. As part of his sentence, the court imposed on defendant the \$30 court facilities assessment. Defendant contends the assessment is unauthorized and must be stricken because the crimes occurred before section 70373’s effective date. The issue

is whether the statute applies when the crime was committed before the statute became effective.

Defendant relies on *People v. Tarris* (2009) 180 Cal.App.4th 612, 628 [4th Dist. Div. 2], in which this court commented summarily that “the trial court erred in assessing a court construction fee under Government Code section 70373 because the fee statute was not yet in effect at the time of sentencing.” *Tarris* is factually distinguishable from the present case, in which the crime was committed in July 2008 before the statute became effective but defendant’s conviction and sentencing occurred after the statute’s effective date of January 2009.

Instead, the circumstances of the present case dictate that we follow the persuasive reasoning of the Third District Court of Appeal, and subsequent cases, that the date of conviction, not the date of the crime, controls application of the statute. Section 70373 can and does apply to crimes committed before its enactment. (*People v. Castillo* (2010) 182 Cal.App.4th 1410, 1413-1415 [Third Dist.] (*Castillo*); *People v. Fleury* (2010) 182 Cal.App.4th 1486, 1492-1494 [Third Dist.]; *People v. Davis* (2010) 185 Cal.App.4th 998, 1000-1001 [Second Dist., Div. Four]; *People v. Phillips* (2010) 186 Cal.App.4th 475, 477-479 [Fifth Dist.] (*Phillips*), petn. for review filed Aug. 9, 2010; *People v. Knightbent* (2010) 186 Cal.App.4th 1105, 1111-1112 [Third Dist.])

In discussing *Castillo* and *People v. Alford* (2007) 42 Cal.4th 749 (*Alford*), the *Phillips* court compared the language of Penal Code section 1465.8 with section 70373: “The [*Alford*] court determined that the statute [section 1465.8] did not violate ex post facto prohibitions because it served a nonpunitive purpose. The *Alford* court also

determined that the Legislature intended Penal Code section 1465.8 to apply where the conviction occurred on or after the statute's effective date, regardless of when the crime occurred. (*Alford, supra*, at pp. 754-756.) In doing so, the court relied on the fact that Penal Code section 1465.8 was created by an urgency statute enacted as part of an emergency budgetary measure for the purpose of funding court security.” (*Phillips, supra*, 186 Cal.App.4th at p. 478.)

The *Phillips* court agreed with *Castillo* “that it is the language of the statute that controls” and that the Legislature intended section 70373 to apply to convictions occurring after its effective date. (*Phillips, supra*, 186 Cal.App.4th at p. 478.) *Phillips* also agreed with *Castillo* that “the fact that section 70373 is part of a budgetary enactment [fn. omitted] supports application of the assessment to convictions regardless of the date of the underlying offense. (*People v. Castillo, supra*, 182 Cal.App.4th at pp. 1414-1415.) The assessment ‘is but one component of a broader legislative scheme in which filing fees in civil, family, and probate cases were also raised. [Citation.]’ (*People v. Brooks* (2009) 175 Cal.App.4th Supp. 1, 4 [§ 70373 does not violate ex post facto prohibitions].) Similarly, the court security fee considered in *Alford* was enacted as part of a larger budgetary measure. (*Alford, supra*, 42 Cal.4th at p. 754.)” (*Phillips*, at p. 479.) We see no compelling reason to reconsider the holdings in *Castillo*, *Phillips*, and their ilk.

Finally, we do not agree with defendant's strained interpretation that “[s]ubdivision (b) of section 70373 would be utterly and completely unnecessary if the assessment under subdivision (a) was not a fine, penalty or forfeiture.” In our reading of

the statute, subdivision (b) simply clarifies that the assessment is not punitive, unlike other kinds of penalties authorized by the Penal Code and the Government Code.

We conclude that the assessment is not punitive and was properly imposed by the court. We also direct the abstract of judgment and minute order be corrected to show the court ordered defendant to pay a \$30 assessment for each of his three convictions, making the total assessment \$90.

C. Penal Code section 12021, subdivision (a)(1)

In sentencing, the trial court ordered defendant not “to own[,], possess[,], or have under his . . . control . . . any firearm or deadly weapon or related paraphernalia for life.” The People concede the court could not make an order concerning a “deadly weapon or related paraphernalia” but continue to assert the court could make an order prohibiting lifetime possession of a firearm.

A convicted felon is prohibited from possessing a firearm: “Any person who has been convicted of a felony under the laws of the United States, the State of California, or any other state, government, or country . . . and who owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.” (Pen. Code, § 12021, subd. (a)(1).) At the time of judgment, the court must advise defendant of the prohibition. (Pen. Code, § 12021, subd. (d)(2).) The prohibition could also be properly made a condition of probation or parole. (Pen. Code, §§ 1203.097, 3053.)

We agree with the parties that the court could not impose a sentence involving a “deadly weapon or related paraphernalia.” Therefore, we order the minute order

corrected to strike that language.

IV

DISPOSITION

We affirm the judgment but order the trial court's May 29, 2009, sentencing order and the abstract of judgment be corrected to impose a \$30 assessment for each of defendant's three felony convictions. We also order the sentencing order be modified by striking the prohibition against owning, possessing, or having under defendant's control "any deadly weapon or related paraphernalia" and instead, imposing a prohibition on ownership, possession, custody and control of a firearm. Finally, we order the confusing use of the word "concurrent" in the sentencing order be stricken.

The matter is remanded to the trial court with directions to modify defendant's abstract of judgment accordingly, and forward a copy of the revised abstract to the Department of Corrections and Rehabilitation.

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s/Richli

J.

We concur:

s/Ramirez

P. J.

s/Miller

J.